No. 455

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

CURTIS ALLEN, WHARTON ALLEN, GEORGE NELSON ALLEN, and THE FIRST NATIONAL BANK OF COLORADO SPRINGS, Executors of the Estate of MARIA McKEAN ALLEN

PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961. No. ——

Curtis Allen, Wharton Allen, George Nelson Allen, and The First National Bank of Colorado Springs, Executors of the Estate of Maria McKean Allen,
Petitioners,

v.

United States of America

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, by and through their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Findings of Fact (R. 30-37, 39)[1] and Conclusions of Law (R. 37-38) of the District Court are not reported. The opinion of the Court of Appeals (Appendix, *infra*, pp. 15-19) is reported at F. 2d .

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[1]Record references are to the "Transcript of Record," printed for use in the Court of Appeals, submitted herewith. The certified record has been lodged with the Clerk.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1961 (Appendix, *infra*, p. 19). The judgment was modified by order of the Court entered on August 22, 1961 (Appendix, *infra*, p. 20). Petition for Rehearing was denied on August 22, 1961 (Appendix, *infra*, p. 20). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTION PRESENTED

Whether the corpus of a trust supporting a reserved life estate is removed, for federal estate tax purposes, from the decedent's gross estate by a bona fide sale at the full value of the reserved life estate.

STATUTE INVOLVED

Internal Revenue Code of 1939:
Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * * * *

(c) [as amended by Sec. 7(a) of the Technical Changes Act of 1949 (Act of October 25, 1949), c. 720, 63 Stat. 891; Sec. 501(b) of the Revenue Act of 1950, c. 944, 64 Stat. 906] *Transfers in Contemplation of, or Taking Effect at, Death.*—

(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

(A) in contemplation of his death; or

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;

• • • • • • • •

26 U.S.C. 1952 ed., Section 811

STATEMENT[2]

The decedent, Maria McKean Allen, created an irrevocable trust in which she reserved three-fifths of the income for life, the remainder to pass to her two children, who are the beneficiaries of the other two-fifths interest in the income. (R. 6, 7-15, 31.) When she was approximately 78 years old, the decedent was advised that retention of the life estate would result in her attributable share of the corpus being included in her gross estate, for estate tax purposes. (R. 32, 74.) With her sanction, counsel began searching for a competent means of divestiture, and learned that decedent's son, Wharton Allen, would consider purchasing his mother's interest in the trust. (R. 32-33, 74-78.) At the time, the actuarial value of the retained life estate, based on decedent's life expectancy, was approximately $135,000, and her attributable share of the corpus, i.e. three-fifths, was valued at some $900,000. (R. 6, 35, 99.) Upon consultation with his business advisers, Wharton Allen agreed to pay $140,000 for the life estate, believing that decedent's actual life span would be sufficient to return a profit to him on the investment. (R. 33-34, 97-98.) For all substantial purposes, Wharton Allen

[2] This statement is in large measure a repetition of the excellent summary of the facts contained in the majority opinion of the Court of Appeals (Appendix, *infra*, pp. 15-17).

was a bona fide third party purchaser; he was not in a position to benefit by any reduction in his mother's estate. (R. 33, 78, 101.) The sale was consummated and, upon paying the purchase price, Wharton Allen began receiving the income from the trust. (R. 34-35.)

At the time of the transfer, decedent enjoyed relatively good health and was expected to live her normal life span. (R. 43, 47.) A short time thereafter, however, it was discovered that she had an incurable disease, which soon resulted in her untimely death. (R. 37, 43-45.) As a result of the death, Wharton Allen ceased receiving any trust income and suffered a considerable loss on his investment. (R. 34-35, 36, 114.)

The Internal Revenue Service determined that three-fifths of the corpus of the trust, less the $140,000 paid for the life estate, should be included in decedent's gross estate because (1) the transfer was invalid because it was made in contemplation of death, and (2) the sale was not for an adequate and full consideration within the meaning of the parenthetical exception to the contemplation of death statute, Section 811(c)(1) of the Internal Revenue Code of 1939.

Petitioners paid the estate taxes determined in accord with the Commissioner's valuation of the decedent's estate, and filed timely claim for refund in the amount of $301,717.49 principal tax plus interest paid in the amount of $56,145.29. (R. 24-27, 37.) Petitioners alleged that the sale of the life interest was for an adequate consideration and that, therefore, no part of the trust corpus was properly includible in the gross estate. (R. 24-27.) The claim for refund was disallowed. (R. 28.) Petitioners thereupon filed suit for refund in the United States District Court for the District of Colorado. (R. 3.) The District Court held for the Petitioners, finding that the transfer was in contemplation of death, but, nevertheless, that the sale was bona fide and that the consideration paid for the life estate was adequate and full, thereby serving to divest decedent of any interest in the trust, with the

result that no part of the corpus was subject to estate taxes. (R. 29-30, 37-38.) In so holding the District Court relied on *Sullivan's Estate* v. *Commissioner*, 175 F. 2d 657 (C. A. 9th). (R. 29.) The Court of Appeals reversed, Judge Breitenstein concurring in the result. (Appendix, *infra*, pp. 18-19).

REASONS FOR GRANTING THE WRIT

1. *The decision is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in Sullivan's Estate* v. *Commissioner, 175 F. 2d 657.*

There are two statutory provisions involved in the present case. One, Section 811(c)(1)(B), *supra*, provides that where a grantor has retained a life interest in a trust, the corpus of the trust is includible in the grantor's estate for estate tax purposes. Although this provision is operative here, its construction is not at issue, with one exception discussed later.

The second provision, Section 811(c)(1)(A), *supra*, provides for the inclusion in the gross estate:

> To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—
>
> (A) in contemplation of his death: . . .

The interpretation of the parenthetical exception in this section is the issue in the present case.

The decedent owned property worth X dollars which, had she died still owning it, would have resulted, under Section 811(c)(1)(B), in the includibility in her gross estate of property worth 6X dollars. By bona fide sale she transferred the property worth X dollars and received X dollars in consideration. The X dollars was ade-

quate and full consideration for the property transferred. The question is whether the X dollars was adequate and full consideration, within the meaning of the statute above, where the removal of the value of X dollars from the gross estate had the effect of eliminating the other 5X dollars from the gross estate.

This problem is a child of the difficulties which have faced Congress in its effort to draft an equitable estate tax law relating to inter vivos transfers having a testamentary character. In dealing with the problem, Congress has provided for the inclusion in the gross estate of various types of property which are not actually owned by the decedent at death. One example of the Congressional solution to such inter vivos transfers is furnished by the statute involved in a present case, in which Congress has said that if a decedent reserved a life estate the remainder shall also be included in the gross estate. Another example is the section[3] dealing with jointly-owned property, stipulating that where property is so held the value of the entire property shall be included in the gross estate. There are many other examples, as will be discussed below. While making provision for the results which follow upon the retention of property with respect to inter vivos transfers, Congress has failed to make a specific provision in each instance for the estate tax results which follow the release, in contemplation of death, of the properties reserved. Congress has left the solution of this problem to that section, set out above, which applies generally to all transfers in contemplation of death.

Considering the wide variety of inter vivos transfers with retained properties and powers to which the contemplation of death section applies, it is surprising that the problem has not been already firmly settled. An answer was supplied by the Court of Appeals for the

---

[3] Section 811(e) under the 1939 Code, and Section 2041 under the Internal Revenue Code of 1954 (26 U.S.C. 1952 ed. Supp. V, Sec. 2041).

Ninth Circuit, *Sullivan's Estate* v. *Commissioner*, 175 F. 2d 657, approximately twelve years ago (1949). Perhaps this decision had the effect of settling the law for some time. For instance, the District Court in the present case thought that *Sullivan* was controlling. (R. 29.) In any event, it is now clear that the decision of the Tenth Circuit has created renewed uncertainty and confusion, for it is diametrically opposed to the decision of the Ninth Circuit.

The decedent in *Sullivan* was 77 years old, suffering with cancer from which he died two months after the transaction, which was the subject of the litigation. There were two issues in the case, but we are concerned only with the second issue which involves a parcel of property owned in joint tenancy with his wife. As has already been pointed out, the 1939 Code estate tax statute, Section 811(e), provides that had the decedent died retaining the joint ownership in the property, the full value of the property would have been included in his gross estate, irrespective of the actuarial value of the interest which he owned at death. This result, of course, is identical to the result in the present case had the decedent died still owning the reserved life estate.

In *Sullivan*, the decedent attempted to meet the qualifications of the same parenthetical exception to Section 811(c)(1)(A), which the Petitioners now contend apply to the present situation, i.e., "except in case of a bona fide sale for an adequate and full consideration." Decedent and his wife conveyed their respective interests in their joint tenancy to each other, the joint tenancy was thereby terminated, and a tenancy in common created. The transaction was in contemplation of death. The Ninth Circuit held that the transfer by decedent's wife to him of her interest in the joint tenancy was fair value for the reciprocal transfer to her. The Court held, relying on the precise wording of the parenthetical exception, that "adequate and full consideration" means fair value for the

interests transferred, and that, under this construction, the full value of the jointly-held property, which but for the transfer would have been included in his gross estate, was not so includible.

Until the present decision was handed down, this *Sullivan* rule has been recognized by lower courts as the controlling interpretation of the extremely crucial parenthetical exception.[4] For this reason, as more fully explained below, it is important both to taxpayers and to the Commissioner of Internal Revenue that the conflict between *Sullivan* and the present decision be resolved.

2. *A definitive judicial interpretation of the present issue will settle needless confusion in a substantial area of the estate tax law.*

As already mentioned, the area of reserved life estates is not the only one which is affected by the Tenth Circuit's construction of the parenthetical exception to the contemplation of death provision. There are a number of sections of the Internal Revenue Code under which the ownership or reservation of a property right or power results in includibility of a larger interest in the decedent's gross estate. (For present purposes we will enumerate those under the Internal Revenue Code of 1954, substantially identical to corresponding sections under the 1939 Code.) These provisions are those dealing with retention of a reversionary interest (Section 2037); retention of power to alter, amend, revoke or terminate the interest originally transferred (Section 2038); ownership of an interest in jointly held property (Section 2040); ownership of powers of appointment (Section 2041); and incidents of ownership of insurance policies (Section 2042).

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[4] *Baltimore National Bank* v. *United States*, 136 F. Supp. 642 (Md.); *Estate of Carnall* v. *Commissioner*, 25 T.C. 654; see also, *Estate of Brockway* v. *Commissioner*, 18 T.C. 488, aff'd on other issues 219 F. 2d 400 (C.A. 9th); *Estate of Borner* v. *Commissioner*, 25 T.C. 584.

As has also been mentioned, the statute has made no specific provision in each instance for the estate tax results which follow the release of any of these retained properties or powers in contemplation of death. Nor has the Commissioner resolved the issue, either by regulation or by comprehensive ruling. In fact, there is evidence to the effect that the Commissioner has experienced a great deal of difficulty in arriving at a consistent position on the question. For instance, in the Proposed Regulations dealing with jointly held property under the 1954 Code, the Commissioner adopted the rule of the *Sullivan* case. Proposed Regulations, 26 C.F.R. (1954, Section 20.2040-1(d)). Before these Regulations were finally promulgated, the Commissioner handed down a ruling (Rev. Rul. 56-324, 1956-2 Cum. Bull. 999), stating that the corpus of the trust would be included in the gross estate where the life estate had been transferred in contemplation of death.[5] This ruling was, of course, entirely inconsistent with the principle adopted by the Proposed Regulations under Section 2040. The end result was that the *Sullivan* rule was withdrawn before the Section 2040 Regulations were finally adopted. See Treasury Regulations under the 1954 Code, Sec. 20.2040.

Whether the withdrawal of the *Sullivan* rule from these Regulations was prompted by the inconsistency between the Proposed Regulations and Revenue Ruling 56-324 is not important here. It is important, however, to take note of the fact that since 1956, with the exception of present litigation, the Commissioner has taken no position with respect to the problems raised by this case as these problems affect the substantial areas of the estate tax law set out above.

The simple list of these areas under the estate tax law which are affected by the particular concern in the present case is sufficient to demonstrate that any decision

[5] This ruling was handed down in 1956, after Petitioners here had filed claim for refund in 1955. (R. 24-25.) In view of this circumstance it seems clear that the ruling should be given no judicial weight in the present case.

with respect to the release of retained powers or incidents of ownership will affect a great number and variety of taxpayers. That the resolution of the issue has been indefinitely postponed by conflict of decisions in the circuit courts, and that in view of this conflict the Commissioner now is unable to solve the problem by administrative fiat, is unfortunate. But the realities of the situation must be faced. These realities predict a plethora of litigation as taxpayers find themselves in varied situations to which the literal and reasonable meaning of the parenthetical exception applies. And the realities of the situation also predict a continuing conflict of decisions as courts must choose between the precedents available. For these reasons it is imperative that the problems be definitively resolved by this Court.

3. *The decision of the Court of Appeals robs the plain words of the statute of their literal and reasonable meaning.*

Section 811(c)(1) governs the taxability of transfers in contemplation of death and appears to make a clear exception for bona fide sales for an adequate and full consideration. Nothing in the statute itself nor in the legislative history indicates that this section was not intended to apply to transfers of retained property or powers, ownership of which at death results in the includibility of a larger interest in the gross estate. To the contrary, the legislative history of many of the sections affected by this provision supports the affirmative conclusion that Congress intended the section to apply to all contemplation of death transfers, without exception.

The opinion of the Court of Appeals has recognized that in one sense the answer to the question of whether the consideration must be paid for the interest transferred, or for the interest which would have otherwise been included in the gross estate, comes quite simply. The Court has recognized that the decedent here owned no

more than a life estate, could not transfer any part of the corpus, and that the purchaser of the life estate received no more than the interest transferred. The Court admits that it would thus seem to follow that the consideration was adequate and full within the meaning of the statute, first, because such consideration was in fact more than the value of the life estate, and, second, because as a practical matter, it would have been impossible to sell the life estate for an amount equal to the decedent's share of the corpus. (Appendix, *infra*, p. 17.)

From this logical basis, the Court abruptly has moved into the uncertain field of construction of the intent of Congress, deciding that Congressional intent could not have been to allow such an easy avoidance of the taxable incidents befalling reserved life estates.

It is not Petitioner's present purpose to quarrel with the right of the Court of Appeals to construe Congressional intent, although there is, to Petitioner's knowledge, no evidence pointing to the intent claimed by the Court of Appeals. It is Petitioner's purpose to point out that the equitable basis upon which the Court of Appeals rests its decision has no firm footing in the quagmires and complexities of the estate tax law. The estate tax law is, at best, so confusing that equities are difficult, if not impossible, to follow.

The Court of Appeals has, in effect, emasculated the parenthetical exception to the contemplation of death provision. We emphasize once more that the construction of the statute is such that the parenthetical exception applies to all transactions in contemplation of death, and the Court of Appeals' decision would limit the application of the exception to those particular transactions which it would consider fair and equitable within the intent of Congress. In this sense the Court of Appeals is usurping the function of the statute, for Section 811(c)(1) itself incorporates an equitable test for the application of the parenthetical exception. In order for the exception to

apply, the condition of "a bona fide sale" must be met.[6] Thus, the literal and reasonable meaning of the statute may be followed with respect to any situation in this area without substantial inequity resulting. See *Evans* v. *Commissioner*, 30 T.C. 798.

It is true, of course, that statutory language may be restricted by judicial interpretation to avoid results which would defeat the purpose of Congress. This Court, in many instances, has so restricted the meaning of broad, general, statutory terms,[7] but the Court has refused to depart from the literal meaning of the statute where there was no clear and unmistakable evidence that such literal meaning did not express Congressional purpose. *United States* v. *Cumberland Public Service Co.*, 338 U.S. 451; *Crooks* v. *Harrelson*, 282 U.S. 55; *Lewyt Corporation* v. *Commissioner*, 349 U.S. 237, 240.

In this connection, since the *Sullivan* decision Congress has manifested no interest in the present subject. Proposed legislation directed toward a change in the statute has been prepared by the American Law Institute,[8] but, absent this proposal, there is a vacuum of authority with respect to Congressional intent. The Court of Appeals

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[6] The United States District Court in Nebraska has recently handed down a decision, *Harris* v. *United States*, 193 F. Supp. 736, involving a situation somewhat similar to the present case. In *Harris* decedent attempted to transfer his interest in jointly owned property while on (what he thought was) his deathbed. The decision, for the Government, appears to rest on a determination of whether the transfer was in fact "a bona fide sale." Both the District Court (R. 35, 38.) and the Court of Appeals (Appendix, *infra*, p. 16) have recognized that the requirements of a bona fide sale have been met under the present facts.

[7] *Holy Trinity Church* v. *United States*, 143 U.S. 457 (1892); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909); *United States* v. *Goelet*, 232 U.S. 293 (1914); *United States* v. *Amer. Trucking Ass'ns*, 310 U.S. 534 (1940).

[8] In "Federal Income, Estate and Gift Tax Statute," Tentative Draft Number 10, April 30, 1955, at page 48, the Institute indicated that it was considering a change in the prototype of Section 811(c)(1)(A) which would reverse the result reached by the Ninth Circuit in the Sullivan case and by the District Court here.

was able to cite none in support of its decision. In other words, since the *Sullivan* decision was handed down twelve years ago (thus representing the law since that time) Congress has made no move to change the statute. Under these circumstances, it is submitted that the Court of Appeals has no mandate to do that which Congress has refused to do.

4. *The concurring opinion, dealing with a point conceded by the Government, is misleading as a precedent.*

As pointed out before, the construction of Section 811(c)(1)(B), *supra*—providing for the inclusion of a trust corpus in the gross estate where the grantor has "retained" a life estate—was not put in issue by the majority opinion. However, Judge Breitenstein, concurring in the result, was of the opinion that the word "retained" in this section meant retained at the time of the creation of the trust. If Judge Breitenstein's conclusions were correct, any type of transfer of a reserved life estate at any time would be insufficient to remove the corpus of the trust from the gross estate.

This position would produce interesting paradoxes. For example, if A, in 1932, creates a trust reserving a life estate and then releases the life estate in 1934, the corpus of the trust would still be taxable as part of his estate even though he lived until 1980. If B, in 1934, makes an outright gift of the same value as the corpus of A's trust and lives until 1980, there is, of course, no federal estate tax on the value of the gift.

Without detailing the rather burdensome technicalities of the argument, it is clear from the legislative history of the Technical Changes Act of 1949 (Act of October 25, 1949, c. 720, 63 Stat. 891) that this difference in result could not have been intended by Congress. The Government itself has recognized the validity of this conclusion. In its brief filed with the Court of Appeals it admitted that the transfer of a life estate, not in contemplation of death, would serve to remove the corpus of the trust from

the gross estate.[1] The Government has thus conceded that the statute as written permits appropriate action to remove the corpus of a trust with a reserved life estate from the gross estate. The Tax Court has added substance to this concession by reaching the same result in *Estate of Cuddihy* v. *Commissioner*, 32 T.C. 1171.

In view of these factors, Judge Brietenstein's opinion is clearly incorrect, and should not be allowed to further confuse the tangle of precedents in this area.

CONCLUSION

The impatience of the Court of Appeals with the result which follows under a literal and reasonable interpretation of the statute has produced an unfortunate conflict of decisions. In view of the general importance of the question raised by the instant case in the administration of the tax laws, we believe that it is in the public interest that this conflict be resolved by a prompt, authoritative determination.

Respectfully submitted,

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September, 1961

[1] See page 19 of the brief filed by the government with the Court of Appeals.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

United States of America,

Appellant

v.

Curtis Allen, Wharton Allen, George Nelson Allen, and The First National Bank of Colorado Springs, Executors of the Estate of Maria McKean Allen,

Appellees

July 26, 1961

APPEAL FROM THE UNITED STATES DISTRICT FOR THE DISTRICT OF COLORADO.

Before MURRAH, *Chief Judge*, and BRATTON and BREITENSTEIN, *Circuit Judges*.

MURRAH, *Chief Judge:* This is an appeal from a judgment of the trial court awarding plaintiff-executors a refund for estate taxes previously paid.

The pertinent facts are that the decedent, Maria McKean Allen, created an irrevocable trust in which she reserved ⅗ths of the income for life, the remainder to pass to her two children, who are beneficiaries of the other ⅖ths interest in the income. When she was approximately seventy-eight years old, the trustor-decedent was advised that her retention of the life estate would result in her attributable share of the corpus being included in her gross estate, for estate tax purposes. With her sanction, counsel began searching for a competent means of divesture, and learned that decedent's son, Wharton Allen, would consider purchasing his mother's interest in the trust. At that time, the actuarial value of the retained life estate, based upon decedent's life expectancy, was approximately $135,000.00 and her attributable share of the corpus, i.e., ⅗ths, was valued at some $900,000.00. Upon consultation with his business advisers, Allen agreed to pay $140,000.00 for the interest, believing that decedent's actual life span would be

sufficient to return a profit to him on the investment. For all intents and purposes, he was a bona fide third party purchaser—not being in a position to benefit by any reduction in his mother's estate taxes. The sale was consummated and, upon paying the purchase price, Allen began receiving the income from the trust.

At the time of the transfer, decedent enjoyed relatively good health and was expected to live her normal life span. A short time thereafter, however, it was discovered that she had an incurable disease, which soon resulted in her untimely death. As a result of the death, Allen ceased receiving any trust income and suffered a considerable loss on his investment.

The Internal Revenue Commissioner determined that 3/5ths of the corpus, less the $140,000.00 purchase money, should be included in decedent's gross estate because (1) the transfer was invalid because made in contemplation of death, and (2) the sale was not for an adequate and full consideration.[1]

---

[1] Decedent died and the controversy arose prior to adoption of the 1954 Internal Revenue Code. Therefore, the 1939 Code is applicable and pertinently provides:

§811. Gross Estate

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—* * * *

(c) Transfers in contemplation of, or taking effects at death

(1) General Rule. To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

(A) in contemplation of his death; or

(B) under which he has retained for his life * * *

(i) the possession or enjoyment of, or the right to the income from, the property * * *

(k) Transfers for insufficient consideration. If any one of the transfers, trusts, interests, rights or powers, enumerated and described in subsection (c) * * * is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefore by the decedent.

Plaintiff-executors paid the taxes in accord with the Commissioner's valuation of the estate, and brought this action for refund, alleging that the sale of the life interest was for an adequate consideration; and that, therefore, no part of the trust corpus was properly includable in the gross estate.

The trial court held for plaintiffs, finding that the transfer was in contemplation of death, but regardless of that fact, the consideration paid for the life estate was adequate and full, thereby serving to divest decedent of any interest in the trust, with the result that no part of the corpus is subject to estate taxes.

Our narrow question is thus whether the corpus of a reserved life estate is removed, for federal estate tax purposes, from a decedent's gross estate by a transfer at the value of such reserved life estate. In other words, must the consideration be paid for the interest transferred, or for the interest which would otherwise be included in the gross estate?

In one sense, the answer comes quite simply—decedent owned no more than a life estate, could not transfer any part of the corpus, and Allen received no more than the interest transferred. And, a taxpayer is, of course, entitled to use all proper means to reduce his tax liability. See Cravens *v.* C. I. R., 10 Cir., 272 F. 2d 895, 893. It would thus seem to follow that the consideration was adequate, for it was in fact more than the value of the life estate. And, as a practical matter, it would have been virtually impossible to sell the life estate for an amount equal to her share in the corpus. Cf. Sullivan's Estate *v.* C. I. R., 9 Cir., 175 F. 2d 657.

It does not seem plausible, however, that Congress intended to allow such an easy avoidance of the taxable incidence befalling reserved life estates. This result would allow a taxpayer to reap the benefits of property for his lifetime and, in contemplation of death, sell only the interest entitling him to the income, thereby removing all

of the property which he has enjoyed from his gross estate. Giving the statute a reasonable interpretation, we cannot believe this to be its intendment. It seems certain that in a situation like this, Congress meant the estate to include the corpus of the trust or, in its stead, an amount equal in value. I.e., see Helvering *v.* Hallock, 309 U.S. 106; C. I. R. *v.* Wemyss, 324 U.S. 303; C. I. R. *v.* Estate of Church, 335 U.S. 632.[1]

The judgment of the trial court is therefore reversed with direction to dismiss the complaint.

BREITENSTEIN, Circuit Judge, concurring in result.

Section 811 of the 1939 Internal Revenue Code provides for the determination of the value of the gross estate of a decedent for federal estate tax purposes. Among other things, it requires[2] the inclusion of property "(1) to the exent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust • • • (B) under which he has retained for his life or for any period not ascertainable without reference to his death (i) • • • the right to income from, the property • • •."

Trustor-decedent in 1932 created an irrevocable trust and received no consideration therefor. She retained for

[1] In this treatise, Cutting the "Strings" on Inter Vivos Transfers in Contemplation of Death, 34 Minnesota Law Review 57, 70, 71, Professor Lowndes says: "(T)he adequacy of the consideration which will prevent a tax when an incident of ownership in connection with a taxable inter vivos transfer is relinquished in contemplation of death, will be measured against the value of the interest which would be taxable apart from the transfer in contemplation of death, rather than the property interest which is transferred. • • • (T)he determination of what interest is transferred in contemplation of death and what is adequate consideration to prevent a transfer in contemplation of death from being taxable, should be made on the basis of the tax effect of the transfer and the effect of the consideration on the transferor's taxable estate, rather than by the comparatively irrelevant rules of property law."

[2] Int. Rev. Code of 1939, §811(*c*)(1)(B)(i).

life the right to income from ⅗ths of the property which she placed in the trust. By the plain language of the statute that portion of the property held in the trust and devoted to the payment to her of income for life is includible within her gross estate. Such property is an "interest" of which she made a transfer with the retention of income for life.

The fact that the transfer of the life estate left her without any retained right to income from the trust property does not alter the result. As I read the statute the tax liability arises at the time of the inter vivos transfer under which there was a retention of the right to income for life. The disposition thereafter of that retained right does not eliminate the tax liability. The fact that full and adequate consideration was paid for the transfer of the retained life estate is immaterial. To remove the trust property from inclusion in decedent's estate there must be full and adequate consideration paid for the interest which would be taxed. That interest is not the right to income for life but the right to the property which was placed in the trust and from which the income is produced.

As the 1932 trust was irrevocable, trustor-decedent could thereafter make no unilateral transfer of the trust property. Granting that she could sell her life estate as that was a capital asset owned by her,[2] such sale has no effect on the includibility in her gross estate of the interest which she transferred in 1932 with the retention of the right to income for life.

For the reasons stated I would reverse the judgment with directions to dismiss the case.

JUDGMENT

FILED JULY 26TH, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

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[2] Blair *v.* Commissioner of Internal Revenue, 300 U.S. 5, 12.